The Voice of the Legal Profession

OBA Submission on Bill 88, Proposed amendments to the *Employment Standards Act, 2000* for an exemption for certain highly skilled workers

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Submitted by:	Ontario Bar Association

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Introduction

The Ontario Bar Association (OBA) appreciates the opportunity to provide comments on Bill 88, An Act to enact the *Digital Platform Workers' Rights Act, 2022* and to amend various Acts. This submission is focused on the proposed amendments to the *Employment Standards Act, 2000* (the "ESA") relating to business and information technology consultants.

The Ontario Bar Association (OBA)

The OBA is the largest and most diverse volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system, providing services to people and businesses in virtually every area of law in every part of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decisionmakers in the interests of both the profession and the public and delivers over 325 in-person and online professional development programs to an audience of over 12,000 lawyers, judges, students, and professors.

This submission was prepared by members of the OBA Labour & Employment Section with assistance from the OBA Policy and Public Affairs Committee. The Labour & Employment Law Section includes lawyers who primarily represent employers, those who primarily represent employees and/or unions as well as lawyers who represent both sides. The OBA has also sought input from a critical cross-section of the bar from all eight regions, including senior and junior lawyers, from managing partners to new calls and students, who practice across Ontario as solicitors and barristers in a variety of practice settings.

Overview

While the lawyers in the Labour & Employment Section might have differing perspectives on Bill 88 as whole, we do agree that the provisions regarding the exclusion of business and information technology consultants require more thought and attention. In our view, the proposed amendments to the ESA are likely to generate confusion among workplace parties and risk increased litigation costs for individuals, businesses, and organizations.

Comments on Schedule 2 Proposed Amendments to the ESA

The proposed amendments exclude business and information technology consultants from the application of the ESA. These categories of workers are defined as follows:

> "business consultant" means an individual who provides advice or services to a business or organization in respect of its performance, including advice or services in respect of the operations, profitability, management, structure, processes, finances, accounting, procurements, human resources, environmental impacts, marketing, risk management, compliance or strategy of the business or organization;
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> "information technology consultant" means an individual who provides advice or services to a business or organization in respect of its information technology systems, including advice about or services in respect of planning, designing, analyzing, documenting, configuring, developing, testing and installing the business or organization's information technology systems;

Pursuant to the proposed amendments to subsection 3(5) of the ESA, an individual who provides advice or services to a business or organization will be found to be an exempt business or information technology consultant if the following requirements are met:

> 1. The business consultant or information technology consultant provides services through,
>
>   i. a corporation of which the consultant is either a director or a shareholder who is a party to a unanimous shareholder agreement, or
>
>   ii. a sole proprietorship of which the consultant is the sole proprietor, if the services are provided under a business name of the sole proprietorship that is registered under the *Business Names Act*.
>
> 2. There is an agreement for the consultant's services that sets out when the consultant will be paid and the amount the consultant will be paid, which must be equal to or greater than $60 per hour, excluding bonuses, commissions, expenses and travelling allowances and benefits, or such other amount as may be prescribed, and must be expressed as an hourly rate.
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> 3. The consultant is paid the amount set out in the agreement as required by paragraph 2.
>
> 4. Such other requirements as may be prescribed.

i. Proposed exemptions for business and information technology consultants are inconsistent with existing exceptions under the ESA

The proposed exemptions for business and information technology consultants are quite broad and appear to presumptively exclude a significant number of new categories of workers from the application of the ESA.

Section 3 of the ESA presently sets out a limited number of exceptions, including:

- federally regulated employees who are covered by the *Canada Labour Code*
- employees of embassies or consulates for a foreign nation
- student work programs authorized by a school board, college or university
- community participation under the *Ontario Works Act,1997*
- inmates of a correctional institution
- a holder of political, religious or judicial office
- judges, quasi-judicial officers and religious office holders
- elected officials, including trade union officials
- police officers, with exceptions
- a director of a corporation, with exceptions

In our view, these exceptions are narrower and often apply to individuals who have access to other workplace protections, such as unions or professional associations or, in the case of office holders, institutional safeguards.

In addition, Ontario Regulation 285/01 currently exempts certain industries from specific ESA entitlements. For example, many professionals, including lawyers, accountants and registered health care practitioners are exempt from ESA entitlements relating to eating periods, overtime, minimum wage, etc. Pursuant to section 8 of Ontario Regulation 285/01, there are already exceptions on overtime work for employees "whose work is supervisory or managerial in nature" and for "information technology professionals." The proposed amendments in Bill 88 appear to go further to now fully exclude the same professionals from the ESA as a whole.

ii. Lack of clarity, inconsistent with common law definition of "employee"

By creating a much larger exempt category of business and information technology consultants, Bill 88, in effect, establishes two potentially inconsistent or conflicting definitions of "employee" in Ontario. While not qualifying for any of the legislative entitlements under the ESA, at common law, many business and information technology consultants could still meet the test for "employee," as set out by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 (CanLII).

This lack of clarity might lead to public confusion about the law, resulting in contractual disputes and increased litigation risks for both individuals and businesses. This could be amplified as there is a divergence of "large E" employees and "small e" employees, that is, people who do not count as "Employees" under the ESA but do count as employees under the common law. These employees would be entitled to reasonable notice and potentially a host of other protections under the common law but are not covered under the ESA. We believe further clarification about the interplay with the common law is necessary.

One illustration of the possible confusion is with respect to the term "management" in the proposed definition of "business consultant". A company is likely to question, based on the wording in the proposed amendments, whether they could or should convert all their management positions to exempt "business consultants" by asking them to incorporate and entering into an agreement to pay an hourly wage of more than $60 per hour.

Many workers and small business often do not differentiate between employment status and tax status. This could lead to situations whereby individuals and companies believe that it would be a tax benefit for someone to work as a business consultant rather than an employee; while these individuals would have a similar tax base given that employees are able to submit a T2200 to deduct their legitimate business expenses.

iii. Increased litigation costs for individuals, businesses and organizations

The ESA currently does not apply to independent contractors. As stated above, while the proposed amendments appear to enhance the exclusion of an existing exemption, they might also serve to expand ESA protections to other certain types of contractors or consultants, i.e., those who do not meet the specific requirements set out in section 7 of schedule 2. In other words, those independent contractors who do not meet the specific requirements for business and information technology consultants might now be treated as "Employees" under the ESA, which in some cases, is not the parties' contractual intention (for example, where parties truly intend and prefer an equitable independent contractor relationship).

Such uncertainty places considerable risks on small and mid-sized businesses and organizations, who may face increased contractual disputes and litigation about whether the ESA applies and in what circumstances.

iv. Requirement of minimum payment $60 per hour should be indexed

A key requirement in the proposed legislation is that there must an agreement for the consultant's services setting out "the amount the consultant will be paid, which must be equal to or greater than $60 per hour…." In our submission, including a non-indexed dollar amount might cause significant issues in the future, including possible inconsistencies with other entitlements under the ESA, such as the minimum wage

Conclusion

The lack of clarity with respect to the changes relating to business and information technology consultants creates uncertainty for workers, businesses and organizations and could result in increased dispute resolution and litigation costs across sectors. In the circumstances, the OBA urges the Ministry of Labour, Training and Skills Development to reconsider these proposed amendments and to conduct further consultations to determine whether the desired outcome can be achieved by using a narrower approach (for example, specific exception categories as set out in Ontario Regulation 285/01), rather than a whole-sale exemption from the Act.

We thank you for considering our input and look forward to responding to any questions you may have regarding our submission.